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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

against

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The respondent's argument that court-martial jurisdiction is unlimited as to offenses incorrectly assumes that the power granted Congress in Art. I, §8, Cl. 14 is a broad authority to subject any one having the proper "status" to the jurisdiction of military tribunals.

The case is otherwise. The power of Congress to establish court-martial jurisdiction, unlike the powers of Con-

gress respecting interstate commerce and federal court jurisdiction to which it has been analogized by respondent (Res. Br. 24-25), is "very limited and extraordinary." *Reid* v. *Covert*, 354 U.S. 1, 21; *Kinsella* v. *Singleton*, 361 U.S. 234, 240. The jurisdiction of military tribunals "at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law." *Ibid.*[1]

Respondent concedes that the question presented by this case has never been squarely raised or decided by this Court. Respondent's argument is based almost entirely on dicta from cases in which the issue considered by the Court was jurisdiction over the person; this case involves jurisdiction over the offense, an issue not discussed by Court or counsel in cases cited at pages 8-11 of respondent's brief. It would be unusual indeed to base such a broad grant of power to the military on a few casual words of this court.[2]

As this Court has frequently pointed out, a principal concern of the Founders was with the preservation of civilian supremacy over the military and with the historic rights of the criminally accused to trial before an impartial civilian court, by a civilian jury and with full due process safeguards. It is inconceivable therefore, that the Founders intended to incorporate into the Constitutional design, the power to extend military jurisdiction as widely as is here asserted by the respondent.

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[1] See also *Toth* v. *Quarles*, 350 U.S. 11, 23; *Lee* v. *Madigan*, 358 U.S. 228, 232-235; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 307, 318; *Coleman* v. *Tennessee*, 97 U.S. 509, 514.

[2] *Coleman* v. *Tennessee*, *supra*, may be an exception to these remarks in that the Court did consider, in part, jurisdiction over the offense. See petitioner's original brief, pages 21-22.

Contrary to respondent's assertion, history does not support his position. The examples of American military practice during and just after the Revolutionary War set forth in the lengthy appendix to respondent's brief are ambiguous and at best inconclusive. While we have been unable to check each entry closely or examine the primary source material because of the press of time, it is nevertheless clear that substantially all of the entries are on their face either irrelevant or, in many instances, supportive of petitioner's position. As to none of the instances cited do we know whether the accused was on duty at the time of the offense charged or whether the civilian courts were open. In many of the cases cited the offenses charged seem to be typical military crimes and/or offenses committed while on duty.[3] The large majority of cases cited were during periods of war.[4] Others, dated between 1783 and 1812, appear from the nature and place of the offense to have been committed during service on the frontier against the Indians where an informal state of war existed.[5] We agree that in such circumstances prosecutions under the so-called "general article" are—aside from other constitutional objections—historically supported. Such an assertion of court-martial jurisdiction is not inconsistent with our position that court-martial jurisdiction may not extend to conduct having no relation to the military other than the fact that it was committed by a man in uniform. See *Ex parte Mason*, 105 U.S. 696, which we discuss in our main brief at pp. 22-23, 25-26.

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[3] See instances of military punishment listed in appendix to respondent's brief, Nos. 21, 28, 31, 33, 47, 57, 59, 65, 66, 68, 69, 70, 73, 74, 76, 78, 79, 80, 82, 85, 86, 87, 88, 91, 97.

[4] Nos. 1-70 inclusive, 105-112 inclusive.

[5] See Nos. 71-77 inclusive, 80, 82, 83.

Winthrop[6] declares without qualification that the general article—which has been incorporated in all British and American Articles of War—does not encompass crimes "committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order." Such crimes are not to be "regarded as within the description of the Article, but are to be treated as civil rather than military offenses." [Footnote omitted][7] See also *Caldwell* v. *Parker*, 252 U.S. 376, 383; 2 Winthrop, *Military Law and Precedents*, 1122-1123 (1896 ed.).

It was only in such circumstances of wartime, marching armies, and closed or inaccessible civil courts in which court-martial jurisdiction has been extended to reach civilians and civilian offenses committed by members of the military. See Pet. Br. 16-18; *Coleman* v. *Tennessee*, *supra*; *Ex parte Milligan*, 4 Wall. (71 U.S.) 2; *Reid* v. *Covert*, *supra*, at 33-35.[8]

As this Court held in *McElroy* v. *Guagliardo*, 361 U.S. 281, 285, examples based on the "legal concept of troops

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[6] Winthrop, *Military Law and Precedents*, 724 (1920 ed.).

[7] It is true, as Winthrop observes, that "[a] strict rule on this subject, however, has not been observed in practice; and especially as the civil courts do not readily take cognizance of crimes committed by soldiers. . . ." Winthrop, 2 *Military Law and Precedents* (1886 ed.) 1042. As an example Winthrop states that "jurisdiction has not unfrequently been sustained where the offense was committed upon a civilian or an Indian upon a military reservation, or at or in the immediate vicinity of a remote military outpost, or elsewhere where civilian justice could not readily be exercised." *Id.* at 1042 n.1.

[8] *Reid* v. *Covert*, *supra*, at 33, indicates that the authority for expansion of court-martial jurisdiction in time of war may derive not from Art. I, §8, Cl. 14, but from the President's implied war powers independently of Congressional authorization.

'being in the field'" are inapposite to the issue raised by cases such as the instant one.

The amendment to the general article in the Articles of War of 1776 (Res. Br. 14-15) authorizing commanding officers "in quarters, garrisons, or on a march" to exercise summary power to redress "abuses and disorders which may be committed by any officer or soldier under his command" accentuates the limited and appropriate scope of the general article.

Respondent's analysis of the article mandating the delivery of offenders to civil authorities (Res. Br. 15) again misses the point. Criminal conduct, even of a kind directly related to military operations, may subject the offender to concurrent civil and military jurisdiction. *Ex parte Mason, supra.* But this is not such a case—the criminal conduct of the kind involved here has never been considered within the scope of the general article.*

Respondent also relies on Art. XVII of the Articles for the Better Government of the Navy (Act of April 23, 1800, Ch. 33, 2 Stat. 45, 47). (Res. Br. 15-16.) This Court has noted, however, the unique exigencies of naval life which make precedents of naval court-martial jurisdiction "entirely inapposite" to cases such as the present. See *McElroy* v. *Guagliardo*, 361 U.S. 281, 284-285.

There are further points to be considered regarding Art. XVII. The first is that Art. XVII is, to say the least, ambiguous; our reading would indicate that the word

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* As we have shown in Point II of our original brief, the residual jurisdiction of the military, where it is properly exercised, extends only to the military aspects of an offense, not to the substantive civil crime.

"offenses" refers only to desertion.[10] Further, the "on shore" reference does not indicate whether it meant foreign or United States territory. An interpretation of that term consistent with history would limit the jurisdiction to offenses committed on foreign territory, since "from time immemorial the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port." *McElroy* v. *Guagliardo, supra* at 285.

In contrast to the respondent, this Court has found the British historical background presented by petitioner (Pet. Br. 15-19) highly relevant as demonstrating the Founders' intent to limit court-martial jurisdiction to its narrowest degree. This history does not show merely, as respondent simplistically contends, "that Parliament did not trust the Crown" to make the determination of which offenses by members of the armed forces should be subject to trial by courts-martial and that there was a "long-standing dispute as to which of them might establish military law within the realm in time of peace." (Res. Br. 16-17.) This strug-

[10] Art. XVII in its entirety reads:

"If any person in the navy shall desert, or shall entice others to desert, he shall suffer death or such other punishment as a court martial shall adjudge; and if any officer or other person belonging to the navy shall receive or entertain any deserter from any other vessel of the navy, knowing him to be such, and shall not, with all convenient speed, give notice of such desertet to the commander of the vessel to which he belongs, or to the commander-in-chief, or to the commander of the squadron, he shall on conviction thereof, be cashiered or be punished at the discretion of a court-martial. All offenses committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea." See further, Harwood, *Naval Courts-Martial*, 17-18 (1867) which suggests that the "on shore" provision was enacted to fill a jurisdictional gap to cover naval yards and installations.

gle, as this Court has noted and as the Founders knew it, was of constitutional proportions involving the right of every citizen to trial by jury and the maintenance of the integrity of civilian government against martial rule. *Reid* v. *Covert, supra* at 23-27, 29-30; see also 1 Blackstone's Commentaries 413. The Founders were obviously aware from first hand experience that military oppression could be authorized by the legislature as well as the executive; the Constitution was designed to protect civil supremacy, not merely shift the power of oppression from one branch of government to another. *Reid* v. *Covert, supra* at 28-30.

Respondent's discussion of the British Articles of War of 1712 and the Mutiny Acts of 1720 and 1721 (Res. Br. 18-19) is irrelevant to this case. Beginning with the very early courts of Constable and Marshall, as we have noted, the jurisdiction of military tribunals and soldiers in territories "beyond the seas" where the jurisdiction of the Civil Courts of England did not extend, was plenary. See Pet. Br. 17 n.10. This, of course, has nothing to do with our case where the civilian courts were open and capable of exercising jurisdiction.

More to the point is the fact that none of the statutes cited by respondent nor the British Articles of War of 1765, from which the American Articles of War of 1775 were directly drawn, authorized the court-martial jurisdiction over non-military offenses committed in England when the civilian courts were open.[11] See Pet. Br. 13.

[11] If footnote 5 on page 18 of respondent's brief is intended to suggest that the Mutiny Act of 1803 permitted the trial of troops in England in peacetime under the circumstances of this case, we cannot find any authority, and certainly the authorities cited by respondent do not support that proposition.

We submit, that when viewed in its most favorable light, the respondent's presentation supporting court-martial jurisdiction over non-military offenses committed by servicemen in the circumstances of this case, is "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication." See *McElroy* v. *Guagliardo*, *supra*, at 284, quoting from Mr. Justice Frankfurter's concurring opinion in *Reid* v. *Covert*, *supra*, at 64.

Conclusion

The Judgment below should be reversed.

Respectfully submitted,

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